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IN THE  
**Supreme Court of the United States**

October Term, 1982

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Nos. 82-1517/1531

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ELIZABETH BULGATZ,  
JEFFERY LEWIS BULGATZ,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**QUESTION PRESENTED**

I.

WHERE THE DEFENDANTS MAKE A SUBSTANTIAL PRELIMINARY SHOWING THAT A FALSE STATEMENT MADE KNOWINGLY AND INTENTIONALLY OR WITH RECKLESS DISREGARD FOR THE TRUTH WAS INCLUDED IN A SEARCH WARRANT AFFIDAVIT, AND THE RULING MAGISTRATE SPECIFICALLY RELIES UPON SUCH FALSE STATEMENT IN DENYING DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE, SHOULD A HEAR-

## **ING BE HELD UPON TIMELY REQUEST BY THE DEFENDANTS?**

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 10, 1982.

### **CITATIONS TO OPINIONS BELOW**

The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix A. The order of the Appellate Court denying petitioner rehearing is unreported, however such order is reprinted in Appendix B.

### **JURISDICTION**

The judgment of the Court of Appeals was dated and entered November 10, 1982. Jurisdiction is based upon 28 U.S.C. § 1254 (1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The following portions of the Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."

### **STATEMENT OF THE CASE**

In an Indictment filed in the United States District Court for the District of Minnesota, petitioners were charged, together with Wendy Waldron and Juan Ramirez, with con-

spiracy to distribute and the distribution of a controlled substance, cocaine, in violation of 21 U.S.C. §§841 and 846. Following a jury trial, appellants were convicted and sentenced to six years imprisonment.<sup>1</sup>

The evidence showed that on four separate dates during the fall of 1981, Waldron sold cocaine to Special Agent James Hessel of the Minnesota Bureau of Criminal Apprehension (MBCA). On the first two dates, Ramirez was observed arriving at Waldron's residence prior to her meeting with Hessel and was observed leaving Waldron's residence after her meeting with Hessel. On the third date, Elizabeth Bulgatz was observed at the Waldron residence under the same circumstances on the final date, Elizabeth Bulgatz was observed stopping at the residence of Ramirez prior to arriving at Waldron's residence. After the final sale was consummated on November 3, 1981, agents of the United States Drug Enforcement Administration (DEA) and the MBCA attained a warrant authorizing the search of appellants' premises at 3005 Rosewood Lane, Plymouth, Minnesota. The search uncovered various quantities of cocaine in United States currency.

In applying for the warrant, Agent Michael Campion, (MBCA) asserted that Elizabeth Bulgatz met with Ramirez prior to delivering cocaine to Waldron. At the pre-trial suppression hearing, counsel for appellants specifically requested to cross-examine Agent Campion for the purpose of exploring Agent Campion's knowledge of the details surrounding the meeting between Elizabeth Bulgatz and Juan Ramirez. (ST 38-39, 58-59).<sup>2</sup> Based upon the govern-

<sup>1</sup>Co-defendant, Waldron pleaded guilty and, in exchange for her testimony at appellants' trial, was sentenced to three years imprisonment, all but six months of which was suspended. Co-defendant, Ramirez was acquitted.

<sup>2</sup>ST refers to the transcript of the suppression hearing. T refers to the trial transcript.

ment's objection, the magistrate denied defendants' request (ST 60). However, counsel for appellant Elizabeth Bulgatz explicitly reserve the right to renew the motion following Agent Campion's trial testimony (ST 61).

Agent Campion used the same affidavit to obtain warrants for the search of the Ramirez and the Bulgatz residence, and each search revealed quantities of cocaine and currency. The magistrate upheld the search of the Bulgatz residence, but suppressed the evidence found at the Ramirez residence specifically stating that:

"The affidavit in support of the search of the Bulgatz residence supplies much which was lacking to support the search of the Ramirez-Paz residence. Defendant E. Bulgatz started the trip for the November 3 drug sale by leaving her home on Rosewood Lane, a fact missing in *United States vs. Taylor, supra*. Although E. Bulgatz stopped and spoke for a few seconds with defendant Ramirez, there is no evidence that anything changed hands." (Designation of Record index, page 38).

However, Agent Campion's trial testimony revealed precisely that which appellants sought to explore at the suppression hearing; Campion testified that when Elizabeth Bulgatz stopped at the Ramirez residence on her way back to Waldrons, Ramirez was observed by another agent entering Bulgatz's car (T 431-432). It was based upon this contradiction that counsel for the appellants sought to reopen the suppression hearing to inquire further into this discrepancy (T 575-578). The trial court denied the renewed motion to suppress and the motion to reopen the suppression hearing (T 579).

The Court of Appeals affirmed appellants' convictions

(Appendix A, *infra*). The Court of Appeals held that, although Agent Campion had clearly made a misstatement in his affidavit, the appellants offered no proof of recklessness or deliberateness in connection with that misstatement. Therefore, the appellate court concluded, the district court was correct in denying appellants' motion for a rehearing.

### **REASONS FOR GRANTING THE PETITION**

This case presents an important and recurring question of Fourth Amendment law. The holding of the court of appeals misinterprets this court's opinion in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978), wherein Mr. Justice Blackmun stated:

"[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." 438 U.S. at 155, 156.

The only conclusion that may be gleaned from this language is that the defendant need only make a "substantial preliminary showing"; further proof to be developed at the hearing. However, in the instant case, the Court of Appeals



appears to require, preliminary to the hearing, conclusive proof that the statement was deliberately falsified or made with reckless disregard as to its truth or falsity. This is contrary to the holding in *Franks*. Here, Agent Campion's trial testimony, which the Court of Appeals acknowledges is directly contrary to his affidavit, constitutes a substantial preliminary showing that the statements in the affidavit were made with a reckless disregard as to their truth or falsity. The defendants cannot make any further showing unless they have the opportunity to cross-examine Agent Campion.

In addition, although the Court of Appeals purports to rely upon *United States v. Davis*, 663 F.2d 824 (9th Cir., 1981), it appears to have overlooked the fact that Davis' case was remanded for a further hearing. In *Davis*, *supra*, the appellate court ordered an evidentiary hearing because the defendant showed that the affiant used the first person singular instead of using the name of the officer who had actually gathered the facts. This holding is quite similar to the Eighth Circuit Court of Appeals previous decision in *United States v. Lyon*, 567 F.2d 777 (8th Cir., 1977). Therefore, the Eighth Circuit Court of Appeals has appeared to adopt a new standard which not only departs from its previous holdings, but is contrary to the holdings in at least one other circuit.

It is therefore vitally important to the consistent and uniform administration of justice to have this court lend its guidance to the lower federal courts in dealing with this recurring problem.



**CONCLUSION**

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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